IN THE

SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.

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No. 80 - 6451

WILLIE JAMES GIBSON,
PETITIONER

'VERSUS'

STATE OF LOUISIANA, ex rel.

Frank C. Blackburn, warden, respondent

REPLY BRIEF IN RESPONSE TO
BRIEF IN OPPOSITION

DRAFTED BY:

WILLIE JA MES GIBSON

#80839 ASH-4

ANGOLA, LOUISIANA 70712

"TABLE OF AUTHORITY"

PEOPLE V. GOULD, 54 Cal. 2d 631, 481 P. 2d 212, 93 Cal. Rptr 204 (1971)..... 1

UNITED STATES V. FITZPATRICK, 437 F. 2d 19 (2d Cir. 1970)..... 2

UNITED STATES V. WILLIAMS, 436 F.2d 1166 (9th Cir. 1970)..... 2

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Mitchell V. United States, 104 U.S. App. D.C. 57, 259 F. 2d 787, 793..... 4

Willie James Gibson, ...No. 80-6451
Petitioner

Versus

Frank C. Blackburn, Warden, ...Filed:_____
Respondent.

REPLY BRIEF:

Comes the Petitioner, Willie James Gibson, and for his reply brief to respondents opposition; states:

1.

In review ing the transcript, this Honorable Court will find that there was not suffient evidence for a trier of fact to find Petitioner guilty "Beyond A Reasonable Doubt", because, A) The identification procedures were illegal and violated Petitioner's Constitutional Safeguards under the "due process" clause of the Fourteenth Amendment; i.e. "Once a suspect is in police custody there is never any justification for employing photo identification procedures since a corporeal lineup is available" People V. Gould, 54 Cal. 2d 631, 481 P. 2d 212, 93 Cal. Rptr 204 (1971). B) Petitioner further argues that a rational trier of fact would not have found him guilty "Beyond A Reasonable Doubt," because of the physical as well as the tesimonial evidence adduced in the original trial of this matter. i.e. S-2-1, S-2-2, and the testimony of the victim-witness, positive of the robber by("His Mouth") Tr. 85); Further, the victim-witness testified that the only time that she saw the robbers' face was ("Right before he hit me, when I turned, that's when I saw his face.") Tr. 76). C.) With the testimony of Petitioners' alibi witnesses, Petitioner strenuously avers that a rational trier of fact should not have found him guilty.

2.

Petitioner does not deny that there were no objections made concerning introdution of evidence of a photographic lineup at trial, nor

does Petitioner deny, there were no objections to the State's testimony reguarding the identification of Petitioner. However, Petitioner avers that Article 841 of the Code (in part) i.e. "An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurence.", "does not apply" since Petitioner did not have the effectiveness of counsel as guaranteed through his Constitutional Safeguards. Further, as in United States V. Fitzpatrick, 437 F. 2d 19 (2d Cir. 1970) and United States V. Williams, 436 F.2d 1166 (9th Cir. 1970)..... "Nevertheless, in applying a due process test to photo identification procedures while the suspect is in police custody courts have criticized but condoned the procedures. However, when photo procedures are employed with the conscious purpose of avioding a corporeal lineup with "full" Constitutional protection courts are likely are likely to find the procedures "Unfair." People V. Lawrence, 4 Cal. 3d 273, 280, 481 P. 2d 212, 217, 93 Cal. Rptr 204, 209 (1971) (Sullivan, J. Dissenting).

The Third Circuit, on reconsideration of the problem held in Zeiler, 427 F. 2d 1305, "that once a defendant is taken into custody he is entitled to have counsel present at any subsequent photographic lineup. While we think the rule is subject to exceptions, we agree with Zeiler's analysis that the dangers of mistaken identification from uncounseled lineup identifications set forth in Wade are applicable in large measure to photographic as well as corporeal identifications. These include, notably, the possibilities of suggestive influence or mistake- particularly where witness had little or no opportunity for detailed observation during the crime; the difficulty of reconstructing suggestivity even greater when the defendant is not even present; the tendency of a witness identification, once given under these circumstances, to be frozen. While these difficulties may be somewhat mitigated by preserving the photographs shown, it may also be said that a photograph can preserve the record of a lineup. Yet this does not justify a lineup without counsel. The same may be

said of the opportunity to examine the participants to what went on in the course of the identification, whether at lineup or on photograph. Sometimes this may suffice to bring out all the pertient facts, even at a lineup, but this would not suffice under Wade to off set the Constitutional infringement brought by proceeding without counsel. The presence of counsel aviods possibilities of suggestiveness in the manner of presentation that are otherwise ineradicable. "If the witness photographic confrontation was lawful, as the Government now contends, it would not only have independant standing as evidence, byt indeed as this court has already pointed out en- banc, the testimony of a witness pre-trial identification is likely to have far more weight with the jury than taken for granted in court identification."

Furthermore, Petitioner denies the contention of the State that the victim was taken six (6) photographs for viewing, because, in the victim's testimony she states: (Tr. 92) "There were two.", photographs of Petitioner, along with others, shown to her.

Therefore, because of the contradicting testimonies of the victim to the alibi witnesses, i.e. the unreliablity of the victim's testimony, a rational trier of fact should not have found Petitioner guilty "Beyond a Reasonable Doubt."

(3)

Petitioner does not deny that he was given a hearing on the claim of "effective Assistance of Counsel", however, Petitioner does continue his assertion that his counsel was in fact "ineffective". At the hearing on this claim, counsel admitted that he did not file any pretrial motions, nor object to the evidence tendered by the State. Contrary to the State's contention that Petitioner is under the mistaken belief that counsel is required to file pretrial motions in every case, Petitioner is under the belief that counsel should investigate and/or research every avenue of possible defense. Thomas V. Wyrick, 535 F. 2d 407 (1976) 8 Cir. at 414: States:

"Clearly, a defendant must bear the initial burden of demonstrating that counsel failed to perform some essential duty. However, once this failure has been established, it is not so clear which party bears the burden of establishing that counsel's error so significantly under-cut the reliability of the trial process as to require reversal. Secondly, we emphasize that where the attorney's breach of duty has been serious, it is not necessary that the Petitioner demonstrate by perponderance of the evidence that adequate representation would have produced an acquittal. The Petitioner need only to shoulder the additional burden of showing that the alleged error itself sufficiently under-cut the reliability of the trial process to have prejudiced the Petitioner's right to a fair trial. At 415; The Court further quoted from Mc Qeen. "The Petitioner must shoulder an initial burden of showing the existence of admissible evidence which could have been uncovered with reasonable investigation and which would have proved helpful to the original trial. 498 F.2d at 220. At 416; "But once it is shown that defense counsel breached an essential duty, the sufficieny of Petitioner's proof of prejudice turns on whether admissible evidence has been uncovered which a jury could reasonably weigh in assessing guilt or innocence.

Petitioner further contends that counsel's "divergent interest" (defending Petitioner - Running for public office) curtailed his efforts to effectively defend him as enumerated in the United States Constitution.

> "It is counsel's duty to investigate carefully all defenses of facts and law that may be available to the defendant, and if his failure to do so result in withdrawing a crucial defense from the case, the defendant has not had the assistance of counsel to which he is entitled. Mitchell V. United States, 104 U.S. App. D.C. 57, 259 F. 2d 787, 793.

Therefore, Petitioner contends that had counsel "effectively" represented him, Petitioner would very possibly have been acquited.

WHEREFORE, Petitioner prays that this Honorable Court, after examination of the records, grant him relief.

Willie James Gibson

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